Cornell Law Review

Volume 21
Issue 1 *December 1935*

Article 2

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A LIBERAL JUDGE: CUTHBERT W. POUND

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It would be interesting to discover the extent of the influence of Judge Pound's judicial work upon the development of the law; but little can be done in that direction. If a case in which he wrote the opinion has been cited and "followed", it is a violent assumption that the later decisions were due to the earlier one; it is in general quite as good a guess that the conditions which produced it would have produced them even if it had not occurred. But suppose it is assumed, on however slight a basis, that the first decision did influence the law. Still we do not know that Judge Pound influenced the law; for we do not know that he influenced the decision of the case in which he wrote the opinion, unless that case was decided by a bare majority of the court. No doubt many cases to which Pound's name is attached would have been decided as they were if he had never sat upon the bench; just as, conversely, he doubtless influenced the court's judgment in many cases in which he did not write the opinion. As the writing of opinions in the Court of Appeals goes in rotation, it is less likely than in some other courts that the judge who writes the opinion happens to influence the decision. The influence of a case depends largely on its argument and language, and these may be attributed to the judge who wrote the opinion. But it is impossible to apportion the influence which a case may be thought to possess, as between the court and the decision on the one hand and the language and its author on the other.

Qualifications have been suggested even upon the proposition that a judicial opinion itself is the author's own. It has been suggested that only a dissenting, or separately concurring, opinion truly represents its author, because in the case of a majority opinion "the decision, and usually the language, must ordinarily be acceptable to the entire bench for whom the judge writes."[1] Dissents and separate opinions are a small fraction of the judicial output even of a rugged individual like Pound, and one who undertakes to discuss his judicial writing can hardly ignore the opinions in which he spoke for the court. He might have spoken differently if he had not been engaged in finding formulae upon which four or more men could agree; yet

*The author gratefully acknowledges the invaluable help of Mr. Robert S. Pasley, Jr., one of the editors of the QUARTERLY, in the preparation of this article.

[1]Samuel Klaus, review of MR. JUSTICE CARDOZO. A LIBERAL MIND IN ACTION. (1935) 35 COL. L. REV. 958.

he may fairly be assumed to have meant what he said. What is certain is that by attaching his name to it he attached it to his name. Pound talking for his colleagues is as much himself as Pound talking for the lower court, the parties, or the public. One must talk for some one. Moreover there is nothing to prevent a judge from using, in support of a result in which his colleagues concur, arguments in which they do not concur. The entry, "———, J., concurs in the result," is familiar. And even in a separate or dissenting opinion, a judge sometimes talks primarily for his colleagues.

While no one can know the extent of the influence of Judge Pound's judicial work, one may characterize its direction as liberal.

I. Liberal Judges

"A liberal judge" may mean various things. Mr. Pollard, in his *Mr. Justice Cardozo, A Liberal Mind in Action,* appears to assume that whatever Mr. Justice Cardozo judicially does is by hypothesis "liberal". John Dewey, in writing on *Justice Holmes and the Liberal Mind,*[2] describes as the essence of Holmes's "liberal faith" a "belief in the conclusions of intelligence as the finally directive force in life; in freedom of thought and expression as a condition needed in order to realize this power of direction by thought, and in the experimental character of life and thought." In practical terms this means tolerance of change. As Holmes was a preeminent exponent of this kind of liberalism, one applies to him the term liberal, whether or not one thinks that he had also an effective sympathy with the underdog; but that sort of sympathy is, I believe, a second characteristic of "a liberal judge" as the term is commonly understood. These two characteristics frequently reinforce each other and point toward the same judicial decision; but one is irrelevant in some situations which engage the other, and in some situations the two conflict. If one's liberalism stops where John Dewey intimates that Holmes's did, one is as tolerant of experiments in the third degree as of experiments in probation, of increases in the concentration of income and leisure as of increases in their diffusion, of exacerbations as of improvements in the relative positions of workingmen, women, radicals, and foreigners. That was not the case with Judge Pound. He was a liberal judge in the second sense as well as in the first.

The opportunities of a liberal judge depend, of course, upon "The Nature of the Judicial Process." Mr. Justice Cardozo, in his classic book of that name, observes: "One of the most fundamental social interests is that law shall be uniform and impartial. There must be

[2] In Mr. Justice Holmes, ed. by Felix Frankfurter (1931) pp. 33, 34.

nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression."[3] "When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[4] Conflicting social interests must be weighed and balanced. "If you ask how he [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law. . . None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom."[5]

Liberal Judges and Change. Within the limits of the judicial process, a liberal judge's tolerance of change has room to show itself frequently with regard to judicial legislation and with regard to statutes.

Liberal judges, in common with enlightened judges of other leanings, recognize that, as Justice Holmes expressed it, "general propositions do not decide concrete cases"; they reject "the old Blackstonian theory of pre-existing rules of law which judges found, but did not make."[6] They are relatively immune to "the phenomenon known as

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[3]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) pp. 112–113.
[4]*Id.* at 65. [5]*Id.* at 113–115. [6]*Id.* at 131.

the jurisprudence of conceptions, the method of rigidly defining certain legal conceptions in terms of legal experience of the past, and expecting to decide future cases for all time by referring them to these conceptions and applying to them rules definitely attached thereto under quite distinct conditions and in other societies."[7] Unlike most lawyers of the last century, and many lawyers of today, they do not conceive "the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitely prescribed as such or exactly deduced from authoritatively prescribed premises."[8] So of the pseudo "historical" idea which has competed with the analytical "jurisprudence of conceptions" for conventional acceptance; the idea that "judicial decision . . . must run of necessity along historically fixed lines", and more specifically that it is marked by an inevitable progress from status to contract, to a "maximum of abstract individual free self-assertion."[9] Liberal judges recognize that within vague but large limits their decisions are compelled neither by prior decisions nor by a supposed historical movement, and that within these limits they can and must be guided by ideas of justice or of social advantage. In discharging the legislative part of the judicial function they act with somewhat more freedom than most judges, and with far more consciousness of what they are about.

Justice Holmes once remarked: "When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right."[10] Liberal judges, on the other hand, recognize that no particular set of economic and social views is enshrined in constitutions and superior to statutes; in Justice Holmes's phrase, that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics".[11] "In judging the validity of statutes," says Justice Cardozo, "the thing that counts is not what I believe to be right. It is what I

[7]Roscoe Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 817.
[8]*Id.* at 940.
[9]*Id.* at 823, 821.
[10]HOLMES, COLLECTED LEGAL PAPERS (1920) p. 184.
[11]Lochner v. New York, 198 U. S. 45, 75, 25 Sup. Ct. 539 (1905).

may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."[12] While judges generally admit this as an abstract proposition, to act upon it under stress is one of the marks of a liberal judge. It may be suggested that a liberal judge is seldom subjected to the stress in question, as he is likely to be in sympathy with legislation. It is true that he is frequently in sympathy with the legislation which his conservative colleagues reject; but the suggestion overlooks the fact that many statutes are wholly unwelcome to liberals. It is as unusual for a liberal judge to feel authorized to invalidate a statute which he dislikes as to feel obliged to invalidate one which he likes.[13]

A liberal judge not only tends strongly to hold statutes constitutional, but does not treat them as indiscretions to be minimized when they cannot be ignored. He tends to interpret them more "liberally", *i. e.,* to attribute to them more meaning, than his conservative colleagues.

Tolerance toward the advocates of change is, of course, another respect in which a liberal judge's tolerance of change manifests itself.

Liberal Judges and the Unprivileged. The characteristic of liberal judges, or most of them, which I have loosely labeled sympathy with the underdog, has many opportunities and varieties of expression. Granted that law is frequently to be made, and that the social interest or welfare is to be sought, the question remains, what is the social interest? What is good for the goose may be very bad for the gander. How are competing interests to be evaluated? To quote again from Justice Cardozo: "Deep below consciousness are . . . the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. . . The decisions of the courts on economic and social questions depend upon their economic and social philosophy. . . In every court there are likely to be as many estimates of the 'Zeitgeist' as there are judges on its bench."[14] To determine where the social interest lies is to balance conflicting interests of individuals or groups. Information and intelligence alone do not answer the question whether peaceful picketing does more harm than good or vice versa; the answer depends partly upon one's apprehension of facts and partly upon

[12]CARDOZO, *op. cit. supra* note 3, pp. 88–89.

[13]"A striking illustration of Mr. Justice Holmes' deference to legislation with which he has no sympathy appears in his dissent in Bartels v. Iowa, 262 U. S. 404, 412 (1923)." Felix Frankfurter, in MR. JUSTICE HOLMES (1931) p. 236.

[14]CARDOZO, *op. cit. supra* note 3, pp. 167, 168, 171, 174.

the relative strength of one's sympathies with union men, non-union men, employers, and consumers; with recipients of small incomes and large ones, of earned incomes and unearned ones. "Judges," as Judge Learned Hand has said, "are usually taken from that part of the bar which has distinguished itself in the field of action. They are likely to be men of strong will, set beliefs and conventional ideals. They are almost inevitably drawn from the propertied class and share its assumptions."[15] They "usually reflect the attitudes of their own income class on social questions."[16] True, there are multitudes of situations in which judges of all sorts, finding an applicable precedent or principle or statute, do not feel free to enact something different and more in accord with their ideas of social welfare. The point is that there are other situations, more or less interstitial, in which no clearly applicable precedent or principle or statute appears, or in which judges "are called upon to say how far existing rules are to be extended or restricted"; they must then "let the welfare of society fix the path, its direction and its distance."[17] To say that, in such situations, they usually reflect the attitudes of their own income class is not to say that their views are determined consciously, or even unconsciously, by their own interests; it is simply to say that the views of most judges, like the views of the majority of any group, are those of their environment. Most men are orthodox, otherwise orthodoxy would be heterodoxy.

A liberal judge has a heterodox picture of a good society. When he is called upon to determine where the balance of social advantage lies, he allows less weight than is orthodox to the interests of the propertied, enterprising, and employing classes, and more weight than is orthodox to the interests of the propertyless and working classes. He tends toward a similar heterodoxy at other points along the line between the privileged and the unprivileged, by giving less weight than the orthodox judge to the interests of conventional male Americans and more weight than he to the interests of women, radicals, irregulars, foreigners, and criminals. There has been controversy as to whether a judge *should* be governed, in his interstitial legislation, by his own notions or by prevalent notions. Justice Cardozo has said, "Let us suppose, for illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to gov-

[15]MR. JUSTICE HOLMES (1931) ed. by Felix Frankfurter, p. 119.
[16]F. S. Cohen (1935) 35 COL. L. REV. at p. 845.
[17]CARDOZO, *op. cit. supra* note 3, p. 67.

ern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times."[18] This is persuasively put, but I venture to differ with Justice Cardozo. Suppose that the judge who hates theatres is also a prohibitionist, and that he is called on to determine an open and even question in the law of wills, knowing that one answer will give a large sum to the owners of a growing chain of theatres while the other answer will give it to the W. C. T. U. If he is persuaded that "the *mores* of the times" are favorable to theaters and unfavorable to prohibition, should he put the money where it will do, as he believes, the most harm? If a judge believes that labor unions are useful but unpopular, should he decide open questions of labor law adversely to them? In most situations we recognize that, within the limits permitted by law, a man may commendably seek to further his own principles, although he knows they are unpopular. If a writer or politician or social worker or teacher may do so, why may not a judge? There is no statute and no settled common-law principle that requires a judge, within the interstitial area that we are considering, to prefer prevalent views to his own. On the contrary, the idea that, in Professor Gray's language, "he should follow his own notions,"[19] is probably more widely accepted. If that subjective theory prevails, most judges will continue to vote the orthodox ticket because most judges are orthodox, but the heterodox will be free to dissent. If Justice Cardozo's objective theory prevails, the votes of the orthodox will not be affected, but the heterodox will be admonished to join them in voting the straight ticket. It is not apparent why the inevitable loading of the dice in favor of orthodoxy should be thus increased. Most arguments that are made for academic freedom may be made for judicial freedom. It is favorable to variation and experiment, which are favorable to improvement. And it would be as stultifying for a judge as for a teacher to be forbidden to further in his professional work any but accepted opinions.

A minor but substantial difficulty with the objective position on this point is the difficulty of determining what opinions are "accepted". His own notions a judge may know, but on most points there are no statistics as to the conflicting notions of other people. Even if one knew the opinions of every member of the community, problems of evaluation would remain. Should the same or different weight be given, in determining what is "accepted", to the views of young and old, captains of industry and clerks, labor leaders and stevedores?

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[18] *Id.* p. 108.

[19] Quoted by CARDOZO, *ibid.*

In any case, as Justice Cardozo points out, "The distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more . . . In the practical administration of justice, it will seldom be decisive for the judge . . . The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs."[20]

II. Judge Pound's Tolerance of Change

"Jurisprudence of conceptions." Both in terms and in effect, Pound repudiated what is known as the jurisprudence of conceptions. "Mechanical concepts of jurisprudence," he said, "make easy a decision on the strength of seeming authority."[21] He constantly refused to force facts into fixed categories. In a number of cases this refusal protected the intentions of the makers of documents. In *Lipedes v. Liverpool & L. & G. Insurance Co.*,[22] a fire insurance policy stipulated that it was to be void if the property "be or become incumbered by a chattel mortgage". The question was whether the policy was avoided by a subsequent mortgage which the court found to be void for usury. Three judges held that a void mortgage was no mortgage, and that the policy was valid. Pound, for the majority of the court, held the contrary. "The question is whether the contract of the parties contemplated the disclosure to the insurance company of the existence of the usurious chattel mortgage."[23] The mortgage "may, if enforcement is resisted, lack legal efficacy, but it exists as a fact and has moral efficacy . . . Property incumbered by a chattel mortgage may cease to be a good moral risk. That the necessities or the ignorance of the insured have forced him into the hands of the usurer does not make the information sought a matter of indifference to the insurer, but rather the contrary."[24] In *Hartigan v. Casualty Co. of America*,[25] a company which had insured "*A* and *B*, Department Store Merchants" against liability was held not responsible to *A* and *B* for their share of the liability of *A*, *B* and *C*, a firm which carried on, in a neighboring city, a business similar to that of *A* and *B*. "The partnerships in this case are not for all purposes to be regarded as legal entities, but for the purpose of ascertaining the intention of the parties

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[20] *Id.* at 110.

[21] People v. Nebbia, 262 N. Y. 259, 270, 186 N. E. 694, 699 (1933); *infra*, p. 28.

[22] 229 N. Y. 201, 128 N. E. 160 (1920).

[23] *Id.* at 203, 128 N. E. at 160. [24] *Id.* at 204, 128 N. E. at 161.

[25] 227 N. Y. 175, 124 N. E. 789 (1919).

to the policy herein, we are governed by common parlance rather than legal parlance."[26] In *Matter of Durbrow,*[27] a testatrix directed her executor to distribute the residuary estate "where he . . . in his . . . judgment shall consider it will be most effective in the advancement of Christ's Kingdom on earth." Many courts would have thought, as the Appellate Division did, that this provision was "void for uncertainty". Pound upheld it. He said, "While the bequest is in the figurative form of a direction to the executor to dispose of the residue of the estate 'in the advancement of Christ's Kingdom on earth', its general purpose and meaning, read with the aid of our common knowledge of the speech of the devout, are understood without difficulty."[28]

In *Goldstein v. The Pullman Company,*[29] Pound refused to say that the company did or did not have "possession" of the passenger's handbag during the night. " . . . It is unnecessary to make fine distinctions to determine the exact status of the sleeping car company. It is *quasi* bailee for hire and *quasi* watchman. In either capacity its duty at night when the passengers are at rest is one of vigilance so that the passenger may not lose his property through its inattention."

In upholding a statute designed to prevent irresponsible persons from engaging in the business of buying milk from farmers,[30] he criticized the cases to the contrary as resting "on the abstract doctrine of liberty of contract rather than the practical necessities of the case."

Judicial Legislation. Few judges have recognized so frankly the existence, within limits, of free judicial choice. Thus in *Stillwell Theatre, Inc., v. Kaplan,*[31] he said, "The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved." In *Campbell v. New York Evening Post,*[32] Pound held that the privilege of fair report extends to the publication of a pleading which has been filed but has not yet received judicial notice. In that connection he said, "We may as well disregard the overwhelming weight of authority elsewhere and start with a rule of our own, consistent with practical experience . . . Consistency requires us to go forward or to go back. We eannot go back and exclude the publication of daily reports of trials before a final decision is reached. The present distinc-

[26] *Id.* at 179, 124 N. E. at 790.
[27] 245 N. Y. 469, 157 N. E. 747 (1927).
[28] *Id.* at 473, 157 N. E. at 748.
[29] 220 N. Y. 549, 555, 116 N. E. 376 (1917).
[30] People v. Perretta, 253 N. Y. 305, 311, 171 N. E. 72, 74 (1930); *infra*, p. 28.
[31] 259 N. Y. 405, 409, 182 N. E. 63, 65 (1932).
[32] 245 N. Y. 320, 157 N. E. 153 (1927).

tion is indefensible. Therefore, we proceed to a logical conclusion and uphold the claim of privilege on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings."[33]

In his dissent in *Allen v. Allen*,[34] in which every judge but two ruled that a wife could not sue her husband for malicious prosecution, Pound said: "We are now confronted with the rule of *stare decisis* and enjoined to defer to cases already adjudicated. The law is said to be established by the express decision of this court that the action cannot be maintained. This argument, if applieable, is weighty but not conclusive . . . When time makes ancient rules of personal rights and remedies uncouth, illogical and productive of harm, they need not be inexorably insisted upon."[35]

In *Seaver v. Ransom*,[36] Judge Pound and the majority of the court, including Judge Cardozo, with three judges dissenting, upheld the contract rights of a third party donee-beneficiary who was the niece of the promisee, and whose case therefore did not fall within any of the categories to which the doctrine of *Lawrence v. Fox* had come to be confined. Pound was evidently minded to cut away all the arbitrary New York limitations on the right of an intended beneficiary, and bring his court into line with the body of American authority and with good sense. After enumerating four kinds of cases in which recovery had been allowed, he said: " . . . a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle."[37] *Lawrence v. Fox,* he said, "attempted to adopt the general doctrine."[38] But, whether from caution or from the necessity of getting half his colleagues to agree with him, he did not plainly lay down "the general doctrine". Instead, he extended one of the established special categories to cover the case before him, by pointing out that "The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child."[39] It is not surprising that, while the broad principle favored by Pound has been applied in some of the subsequent New York cases,[40] in

[33] *Id.* at 328, 157 N. E. at 156.

[34] 246 N. Y. 571, 159 N. E. 656 (1927); *infra*, p. 34.

[35] *Id.* at 575, 159 N. E. at 657.

[36] 224 N. Y. 233, 120 N. E. 639 (1918).

[37] *Id.* at 238, 239, 120 N. E. at 641.

[38] *Id.* at 240, 120 N. E. at 641.

[39] *Id.* at 239, 120 N. E. at 641.

[40] *E. g.*, New York Pneumatic Service Co. v. Cox Contracting Co., 201 App. Div. 33, 193 N. Y. Supp. 655 (1st Dept. 1922); Strong v. American Fence Construction Co., 245 N. Y. 48, 156 N. E. 92 (1927); Wilson v. Costich Co. Inc., 231 App. Div. 346, 247 N. Y. Supp. 131 (4th Dept. 1931); McClare v. Mass. Bonding & Ins. Co., 266 N. Y. 371, 195 N. E. 15 (1935).

others it has not.[41] In *Croker v. New York Trust Co.*,[42] Judge Pound took the further liberal step of recognizing the right of the unbenefited promisee to sue in equity to compel performance of the promise for the beneficiary. On the other hand, in *Gimenez v. Great Atlantic and Pacific Tea Co.*,[43] he squarely declined, on grounds of *stare decisis*, to make a further extension of *Lawrence v. Fox*. A husband, he held, could not recover for loss of consortium and for expense due to the injury of his wife by deleterious food which the defendant sold her. He said: "We do not overlook the fact that a sort of third party beneficiary rule might be invoked to give the husband a cause of action in contract. The answer to that contention is that the courts have never gone so far as to recognize warranties for the benefit of third persons."[44]

In *Harris v. Shorall*,[45] Pound expressed his dissatisfaction with the technical common-law rule that a contract under seal could not be modified by parol agreement. He felt that the "time to dispose of the rule effectively, if not now, is near at hand . . . When so much of the old value and high nature of the seal has been lost, the court should not be tenacious to preserve one of its minor incidents for the sake of the rule but should rather strive to give effect to the real agreement of the parties."[46] Relying on these statements, the lower courts began to hold that a contract under seal could be modified or discharged by parol, and also that the related rule, that only parties named in a sealed instrument could sue or be sued thereon, had been abrogated.[47] Unfortunately for these liberal views, the statements made in *Harris v. Shorall* were *dicta*, and this fact was later seized upon by the Court of Appeals in two decisions reaffirming the common-law rules. In one of these,[48] the court observed that nothing said in *Harris v. Shorall* even suggested that a party not named in a sealed instrument could be sued thereon; in the other,[49] the court overruled what *was* said in *Harris v. Shorall* and held that a sealed contract could not be modi-

[41]Fosmire v. National Surety Co., 229 N. Y. 44, 127 N. E. 472 (1920); Freed v. Tishman, 119 Misc. 721, 197 N. Y. Supp. 259 (Sup. Ct. 1922); Jacoby v. Speyer, 127 Misc. 33, 215 N. Y. Supp. 145 (Sup. Ct. 1926).

[42]245 N. Y. 17, 156 N. E. 81 (1927).

[43]264 N. Y. 390, 191 N. E. 27 (1934).

[44]*Id.* at 395, 191 N. E. at 29.

[45]230 N. Y. 343, 130 N. E. 572 (1921).

[46]*Id.* at 348, 130 N. E. at 573.

[47]Lagumis v. Gerard, 116 Misc. 471, 190 N. Y. Supp. 207 (Sup. Ct. 1921); Van Ingen v. Belmont, 121 Misc. 109, 200 N. Y. Supp. 847 (Sup. Ct. 1923); Diamond v. Talbot, 123 Misc. 339, 205 N. Y. Supp. 309 (Sup. Ct. 1924).

[48]Crowley v. Lewis, 239 N. Y. 264, 146 N. E. 374 (1925).

[49]Cammack v. Slattery & Bro., Inc., 241 N. Y. 39, 148 N. E. 781 (1925).

fied by parol. Pound concurred in the first of these two decisions but was absent when the second was decided. The change originally suggested by him was finally adopted by the Legislature in 1935 in an amendment to the Civil Practice Act.[50]

Pound knew that the common-law rules absolving a municipal corporation of liability for its torts are often anti-social because inhumane. His tendency was to interpret them narrowly. In *Herman v. Board of Education*,[51] a school board had installed an unguarded buzz-saw for the use of the students in manual training, and a student using this saw was injured. Affirming judgment for the plaintiff, Pound said: "The state has not created an irresponsible instrumentality of government and invested it with the power to put children at work at dangerous machinery which it would be a statutory offense against its laws to use in private industries."[52] In *Augustine v. Town of Brant*,[53] the town was maintaining a public park and bathing beach without giving adequate warning of its dangerous character and without taking adequate measures to protect bathers. When a bather was drowned, the town's contention that it was performing a "governmental function" was overruled and it was held liable, on the basis of a "wise public policy,"[54] and "the modern tendency . . . against the rule of non-liability."[55] These were unanimous decisions. In *Canavan v. City of Mechanicville*,[56] the court divided. The plaintiff sued the municipality for supplying water which contained typhoid germs. Admitting that the city was performing a private rather than a governmental function, and that furnishing water was a sale of goods within the provisions of the Sales Act, a majority of the court nevertheless held the city not liable on the theory that, since the plaintiff did not make known the purpose for which he intended to use the water, no warranty of fitness for human consumption could be implied, and also on the ground that adequate inspection was impossible. Pound's dissent was forceful: "If we adopt, as seems inevitable, the theory that the water supplied by a municipal corporation for domestic purposes is sold as such by it to the consumers, I fail to comprehend how we can escape the application of the doctrine of implied warranty of wholesomeness."[57]

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[50]N. Y. Laws 1935, c. 708: "....A written instrument, hereafter executed, which modifies, varies or cancels a sealed instrument, executed prior to the effective date of this section, shall not be deemed invalid or ineffectual because of the absence of a seal thereon."

[51]234 N. Y. 196, 137 N. E. 24 (1922).

[52]*Id.* at 201, 137 N. E. at 25.

[53]249 N. Y. 198, 163 N. E. 732 (1928).

[54]*Id.* at 206, 163 N. E. at 734.

[55]*Id.* at 205, 163 N. E. at 734.

[56]229 N. Y. 473, 128 N. E. 882 (1920).

[57]*Id.* at 481, 128 N. E. at 884.

A curious lapse into mechanical jurisprudence occurred in 1921. In *Drobner v. Peters,*[58] the court, in an opinion by Pound, refused to allow suit by a child for pre-natal injuries negligently caused. Judge Cardozo dissented. The decision of the lower court in the child's favor had been welcomed as "an interesting and commendable development of the law."[59] Both in its result and in its argument, Pound's opinion is anomalous in so liberal a judge. Intimating that "sympathy and natural justice point the way" to a decision in the child's favor, he permitted the way to be blocked by the existence of hostile precedents in other states, the lack of favorable precedent, and the idea that the child in the mother's womb "had no seperate existence of its own . . . His full rights as a human being sprang into existence with his birth." Pound appeared to forget that a court may make law where there was none before, which is all that was necessary to a decision in the child's favor, and may even reverse pre-existing law. He was unconscious that in conferring an immunity on the defendant he was in fact making law no less than if he had conferred a right upon the plaintiff. No doubt the extreme rarity of "pre-natal injury" as a matter of fact, and the danger of mistake and fraud, furnish tenable grounds for denying a right of action, but the former consideration seems not to have been present in Pound's mind, and the "practical inconvenience and possible injustice" to which he referred in passing seem to have had little influence on his decision. In 1934 Judge Pound suggested to the Law Revision Commission that it consider whether the rule of *Drobner v. Peters* should be revised by legislation.[60]

No similar submission to nineteenth-century legalism seems to have occurred in the thirteen years that remained to Judge Pound after *Drobner v. Peters.* But in 1932 he declined an opportunity to liberalize the law on the ground that it was possible to decide the case before him without passing on the interesting point. The plantiff proposed to erect a large billboard near a road; the Superintendent of Public Works proposed to screen it from view. Pound observed that the question how far aesthetic sensibilities might be protected at the expense of property owners was an open one, and he did nothing to settle the question. He said: "The question is whether the Superintendent was justified in erecting this screen to shut off the view of this sign in this location . . . Enough for this decision to say that the Superintendent of Public Works may act reasonably in his discretion

[58]232 N. Y. 220, 133 N. E. 567 (1921).

[59](1921) 21 COL. L. REV. 199.

[60]The Commission transmitted its study of the subject to the Legislature without recommendation. REPORT OF THE LAW REVISION COMMISSION (1935) p. 451.

for the benefit of public travel in screening a billboard at a dangerous curve when by its enormity such a structure may divert the attention of the motorist from the road."[61] " . . . Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."[62] Here Pound's result, on the facts before him, was the liberal one, but by adopting a conventional technic he avoided giving expression to liberal doctrine.

Pound's opinions show a relative indifference to the customs and interests of persons engaged in business activity. Though he was not, in general, reluctant to innovate, cases involving business practices often found him insisting upon what he considered established law. In *McQuade v. Stoneham*,[63] the court was asked to enforce an agreement made by a small group of shareholders in a closed corporation that each would use his best efforts to keep the others as directors and as officers. The defendant, a party to the agreement, obtained control of the corporation and subsequently succeeded in getting plaintiff dropped. Pound refused to enforce the contract in specie by reinstating the plaintiff. He took it as established that, although stockholders might unite to elect directors, they could not unite to place limitations on the power of the directors to select officers and agents. "It is urged," he said, "that we should pay heed to the morals and manners of the market place to sustain this agreement . . . rather than base our decision on any outworn notions of public policy."[64] Conceding that such agreements were not uncommon, that public policy was a "dangerous guide", that the defendant had treated the plaintiff shabbily, he felt "constrained by authority" to hold the contract illegal and void.[65] There was an additional ground for the decision, and two of Pound's colleagues concurred only on this other ground and repudiated Pound's conservative treatment of the point of corporation law.[66]

Similarly in *Langel v. Betz*,[67] Pound refused to follow the American Law Institute and treat the acceptance of the assignment of rights under a contract as importing, in the absence of contrary evidence, a promise to perform the assignor's duties. He conceded that the Institute's rule was "perhaps, more in harmony with modern ideas of contractual relations." In *Gotham Music Service v. D. & H. Music Publishing Co.*,[68] the plaintiff had revived a little-known song called

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[61]Perlmutter v. Greene, 259 N. Y. 327, 332, 333, 334 (1932).
[62]*Id.* at 332.
[63]263 N. Y. 323, 189 N. E. 234 (1934).
[64]*Id.* at 329, 189 N. E. at 236.
[65]*Id.* at 330, 189 N. E. at 237.
[66]*Id.* at 333, 189 N. E. at 238.
[67]250 N. Y. 159, 163, 164 N. E. 890, 892 (1928).
[68]259 N. Y. 86, 181 N. E. 57 (1932).

"Gambler's Blues," had advertised it widely under the name "St. James' Infirmary," and had succeeded in making it popular. The defendant then proceeded to sell the same song under the name "St. James' Infirmary or Gambler's Blues," and the Court of Appeals refused to restrain him from doing so. In a dissenting opinion, Judge Crane thought it unfair that the defendant should reap the harvest of the plaintiff's advertising.[69] Pound, writing for the majority, was unmoved by this aspect of the case. The right to enjoin acts as unfair competition, he said, depends upon a showing that the public is misled into thinking that it is buying the plaintiff's products.

In *Weissman v. Banque De Bruxelles*,[70] *A*, an officer of a corporation, indorsed a check payable to the corporation and deposited it in his personal account in a bank in Belgium. The bank forwarded the check to Washington for collection and credited the proceeds to *A*'s account. *A* withdrew the funds and dissipated them. Under Belgian law, the bank was under no duty of inquiry, and hence not liable to the corporation; under New York law it would be liable. Instead of holding that the Belgian law governed, Pound decided that the transfer took place in Washington, presumed that the law there was the same as that of New York, and held the bank. This result Pound thought fair because banks are constantly taking chances, and this bank, he thought, took a chance.[71] The case has been widely criticized,[72] both on theoretical grounds and as restricting the transfer of negotiable instruments and placing a heavy burden on banks by holding them liable under a law foreign to them and their transactions.

Again, in *Casey v. Kastel*,[73] Pound allowed an infant who had ratified a sale of stock through an agent to disaffirm and to recover from her agent and from the agent's brokers. It has been suggested that such decisions are extreme and that an infant should be estopped to disaffirm when he has taken the benefit of a contract,[74] but Pound was apparently of the opinion that the convenience of modern business should not be allowed to restrict the protection which the law has given to infants.

In *Forstmann v. Joray Holding Co.*,[75] Pound innovated in favor of business, but the facts presented no substantial interest opposed to

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[69] *Id.* at 90, 181 N. E. at 58.

[70] 254 N. Y. 488, 173 N. E. 835 (1930).

[71] *Id.* at 496, 173 N. E. at 837.

[72] Notes (1931) 44 HARV. L. REV. 855; (1931) 31 COL. L. REV. 704; (1931) 29 MICH. L. REV. 928; (1931) 17 VA. L. REV. 493.

[73] 237 N. Y. 305, 142 N. E. 671 (1924).

[74] Note (1923) 8 CORNELL L. Q. 162.

[75] 244 N. Y. 22, 154 N. E. 652 (1926).

that of business. Lands of the plaintiff and of the defendant, in the same block on Madison Avenue, were subject to covenants restricting buildings to residence purposes. The restriction dated from 1907, and was to expire in 1929. In 1916, the district was zoned for business. After the residence character of the neighborhood was largely gone, the defendant in 1924 erected a two-story office building. The action of the Appellate Division in ordering its removal was in line with earlier decisions and *dicta*.[75a] The Court of Appeals reversed, because, as Pound said, the relief given below would "bear heavily on the defendants without benefiting the plaintiffs"; it would neither add to the value of the plaintiff's property nor make it more desirable for residence purposes.

Constitutionality of Statutes. Judge Pound seldom thought that a legislature had exceeded its constitutional authority. Repeatedly he dissented, sometimes alone, when the majority of the court held legislative action invalid.[75b]

While the fate of the Workmen's Compensation Act in the Court of Appeals is a familiar story, it is not so well known that the first judicial opinion in America sustaining this type of legislation was written by Judge Pound. The first compensation act to be adopted by any American state was passed in New York in 1910.[76] In a concise opinion written in the same year,[77] Judge Pound, then a justice of the Supreme Court, upheld the statute, pointing out the unwisdom of construing the Constitution so strictly as to deprive a State of the power to enact into law "the wishes of the citizens as they may deem best for the public welfare."[78] Observing that "our jurisprudence offers examples of legal liability without fault,"[79] Pound felt that the authorities cited by counsel for the railroad "merely point out the shifting character of the border line between statutes which are upheld by the court as being a legitimate exercise of the legislative power to pass all manner of necessary and wholesome acts for the protection and well-being of the public, although such acts may interfere with personal liberty . . . and statutes which are held by the courts to interfere without warrant with the privilege of pursuing an ordinary trade or calling."[80]

[75a]See (1927) 12 CORNELL L. Q. 518.

[75b]But see People *ex rel.* Doyle v. Atwell, *infra* p. 32. And *cf.* McMaster v. Gould, 240 N. Y. 379, 148 N. E. 556 (1925).

[76]N. Y. Laws 1910, c. 674.

[77]Ives v. South Buffalo Railway Co., 68 Misc. 643, 124 N. Y. Supp. 920 (Sup. Ct. 1910).

[78]*Id.* at 645, 124 N. Y. Supp. at 922, quoting Brown, J. in Holden v. Hardy, 169 U. S. 366, 387, 18 Sup. Ct. 383, 386 (1898).

[79]*Id.* at 645, 124 N. Y. Supp. at 923.

[80]*Id.* at 646, 647, 124 N. Y. Supp. at 923, 924.

Affirmed without opinion in the Appellate Division,[81] this decision could not pass the barriers of due process set up by the Court of Appeals,[82] and it was not until the State Constitution was amended in 1913[83] that this type of legislation became effective in New York.[84] Meanwhile other states had adopted Workmen's Compensation Acts which were almost unanimously upheld by the courts. With judicial caution, many of these courts "distinguished" the *Ives* case on the ground that the New York statute had imposed a compulsory and exclusive remedy, and held that legislation offering the parties an election to pursue their common-law remedy was valid.[85] But the "distinction seems to be one without a difference,"[86] as the basic principle of liability without fault, called "revolutionary" by the Court of Appeals,[87] was present in nearly all of these statutes. Other courts upheld compulsory legislation and expressly repudiated the view taken by the Court of Appeals.[88] Pound's pioneer opinion was seldom or never cited.

The New York court itself, perhaps influenced by the almost unanimous concurrence of other courts in Pound's position, quietly changed its views. Although the *Ives* case had been decided partly on the

[81]140 App. Div. 921 (4th Dept. 1910) Williams, J. dissenting.

[82]201 N. Y. 271, 94 N. E. 431 (1911).

[83]N. Y. CONST. art. I, § 19.

[84]N. Y. Laws 1913, c. 816 and N. Y. Laws 1914, c. 41; upheld in Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 600 (1915), and in New York Central Railroad v. White, 243 U. S. 188, 37 Sup. Ct. 247 (1917).

[85]*In Re* Opinion of the Justices, 209 Mass. 607, 96 N. E. 308 (1911); State v. Creamer, 85 Ohio St. 349, 97 N. E. 602 (1912); Sexton v. Newark District Telegraph Co., 84 N. J. L. 85, 86 Atl. 451 (1913); Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211 (1914); Shade v. Ash Grove Lime and Portland Cement Co., 93 Kan. 257, 144 Pac. 249 (1914), *aff'g* 92 Kan. 146, 139 Pac. 1193 (1914); Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71 (1914); Borgnis v. Falk, 147 Wis. 327, 133 N. W. 209 (1911); Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49 (1915); Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556 (1916); Sayles v. Foley, 38 R. I. 484, 96 Atl. 340 (1916).

[86]Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality* (1911) 25 HARV. L. REV. 129, 137.

[87]Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 285, 94 N. E. 431, 436 (1911).

[88]State v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911); Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398 (1915). *Cf.* Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554 (1911).

Contra: The first Kentucky statute was held unconstitutional, partly because it provided for a compulsory remedy. State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 437 (1914). A new statute, making the remedy elective, was upheld. Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648 (1916). *Cf.* Hunter v. Colfax Consolidated Coal Co., 175 Ia. 245, 154 N. W. 1037 (1916).

ground that the statute violated the Fourteenth Amendment to the Federal Constitution,[89] the court held in 1915 that all difficulties had been removed by an amendment to the State Constitution.[90] The lack of logic has been pointed out,[91] but the covert method of overruling an unfortunate decision, while not admirable, is better than none. The final vindication of Pound's position came in 1918, when the United States Supreme Court in the *Arizona Employers' Liability Cases*[92] held that the imposition of liability without fault in hazardous employments did not contravene the Fourteenth Amendment. As Pound himself was able to point out in 1933, "much that was said in the workmen's compensation case . . . about the constitutional vice of providing a remedy which takes one's property without fault on his part was rendered obsolete by *Arizona Employers' Liability Cases*."[93]

In *People ex rel. Alpha Portland Cement Co v. Knapp*,[94] Pound upheld a tax or license statute which every other member of the court considered unconstitutional wholly or in part. The statute imposed a license fee or tax upon foreign corporations for the privilege of doing business in the state. Net income to be used as a basis for the tax was to bear the same ratio to entire net income which certain kinds of assets within the state bore to total assets of certain kinds. Certain intangibles were to be excluded from the list of assets, but income from them was to be included in the income used as a basis for the tax. The prevailing opinion, by Judge Cardozo, took the position that the statute prescribed "a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves an artificial and arbitrary augmentation of the value of the local privilege"; that the corportion should be permitted to subtract from income the amount derived from bond interest, and to add to its assets outside the state its shares in other corporations. Pound saw no reason for holding "that a foreign corporation, if admitted to another state, may be assessed for the privilege of doing business in such state only on the carnings of the local business or on the capital employed therein. The license fee exacted by this state is in no sense a tax on the entire business or property, or the entire income of the relator."[95] On the other hand, in *People ex rel. Hanover National Bank v. Gold-*

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[89]201 N. Y. 271, 294, 94 N. E. 431, 439 (1911).

[90]Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 600 (1915).

[91]Dissenting opinion of Henshaw, J. in Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 712, 151 Pac. 398, 409 (1915).

[92]250 U. S. 400, 39 Sup. Ct. 553 (1918).

[93]Matter of Evans v. Berry, 262 N. Y. 61, 69, 186 N. E. 203, 205 (1933).

[94]230 N. Y. 48, 129 N. E. 202 (1920).

[95]*Id.* at 69, 129 N. E. at 210.

fogle,[96] he wrote the opinion by which the court held unconstitutional a state tax on the capital stock of national banks. The state, he held, "discriminates against national bank shares by imposing a tax both on the shares and the dividends, while it imposes a tax on the income only of other competing capital in the hands of private bankers and other individuals."[97] His record makes it clear that he was expressing a real regret, and not a pious platitude, when he said, "The discrimination is unfortunately too clear to escape recognition."[98].

In *Matter of Doyle,*[99] another case in which Judge Cardozo wrote the prevailing opinion and Pound alone dissented, they differed on the question whether the legislature could by joint resolution, unsigned by the governor, grant immunity to witnesses in aid of a legislative investigation. Pound, with his usual tendency to sustain the action of legislatures, held that the joint resolution gave valid protection, and that a contumacious witness could be punished for contempt, while Cardozo held that the witness could be required to testify only in regard to matters concerning which a *statute* gave him immunity. No judge questioned the legality of the investigation as a whole, or the power of the legislature to punish for contempt in connection with it, although a mere joint resolution and not a statute gave the committee its authority; and Pound reasoned that the power to grant immunity to witnesses was as fairly incidental to the investigation itself as the power to punish for contempt.

In *Mills v. Sweeney,*[1] a liberal attitude on Pound's part toward one piece of municipal legislation was vitiated by a curiously narrow attitude toward another. The city council of Buffalo had enacted an ordinance providing that election officials should submit at a general election any question of public policy petitioned for, in order to obtain the opinion of the electors thereon. Under this ordinance the question was submitted to the voters: "Shall the city of Buffalo own and operate an electric plant . . . in order to produce revenue and thus lower the city taxes?" The Court of Appeals held that the underlying ordinance provided for a "referendum", and was not authorized by the city charter. Pound alone thought the ordinance valid. He pointed out that it involved no true referendum, since it merely permitted the electors to give advice, not to make decisions. He concurred, however, in the court's result, because of the form of the particular question that was submitted to the voters. By assuming that city taxes

[96] 234 N. Y. 345, 137 N. E. 611 (1922).
[97] *Id.* at 352, 137 N. E. at 613. [98] *Id.* at 353, 137 N. E. at 613.
[99] 257 N. Y. 244, 177 N. E. 489 (1931).
[1] 219 N. Y. 213, 222, 114 N. E. 65, 68 (1916).

would be lowered, he said, "it begs the very question which it purports to submit." While it is arguable that Pound's sense of logic was not improperly offended, he cites no authority for his conclusion that logical ineptitude is a fatal vice in an advisory referendum. Argumentative matter does not vitiate a statute, and it is not apparent why it should vitiate a referendum. Pound seems to have devised a wholly novel rule.

In *People v. Westchester County National Bank*,[2] the majority of the court held invalid a bond issue in aid of a soldiers' bonus, largely on the basis of a provision of the New York Constitution that "The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation." Pound and Cardozo dissented, each in an opinion. They thought it clear that war concerned the state as well as the nation, and that a bonus to ex-soldiers was not in the nature of a prohibited gratuity. The purpose "to supplement the pay of the soldiers and thereby to promote military zeal in the future", said Pound, was a public purpose.

In the recent case of *Norman v. Baltimore & Ohio Railroad Co.*,[3] the Court of Appeals met the question of the validity of the Joint Resolution of Congress which authorized and required debtors to discharge in legal tender, and not otherwise, obligations which had been contracted expressly in terms of gold. Judge Pound and three of his associates, relying chiefly on the power to coin money and regulate the value thereof, sustained the action of Congress. "Considerations of convenience are not without weight. All arrangements for payment in money in the future are necessarily under the paramount authority of the political sovereign delegated powers of Congress." The decision was affirmed by the United States Supreme Court.[4]

In *Matter of Evans v. Berry*,[5] a police officer in New York City, while pursuing robbers, had accidentally shot and wounded the plaintiff. The Assembly then passed a local law allowing the city Board of Estimate to award compensation to persons injured in this manner, and the Board made an award to the plaintiff. The Appellate Division denied the validity of this award, but Pound, writing for the court, sustained the award. He recognized a moral obligation upon the city which it could be allowed to assume without violating that provision of the State Constitution which forbids a city to give its money in aid of an individual.[6]

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[2]231 N. Y. 465, 492, 493, 132 N. E. 241, 251 (1921).
[3]265 N. Y. 37, 41, 191 N. E. 726, 728 (1934).
[4]294 U. S. 240, 55 Sup. Ct. 407 (1935).
[5]262 N. Y. 61, 186 N. E. 203 (1933).
[6]Art. VIII, § 10.

Pound's liberal attitude towards constitutional questions is expressed in several cases involving emergency legislation, in each of which he was able to speak for a unanimous or almost unanimous court. In 1920 the State Legislature passed an emergency housing law, stating that a shortage of housing existed, that an unprecedented number of dispossess proceedings were pending, and that landlords were taking advantage of the situation to exact exorbitant rents. The law deprived landlords for two years of possessory remedies to remove tenants already in possession who were willing and able to pay a reasonable rent; and a rent in excess of that charged during the preceding year was presumed unreasonable. The constitutionality of this legislation was attacked, without success, in *People ex rel. Durham Realty Corp. v. La Fetra.*[7] The court, Pound said, will not question the finding of the legislature that an emergency exists, nor will it oppose theories of laissez-faire economics to the legislative finding that the state of supply and demand is abnormal and that profiteering and oppression have become general. "It is with this condition and not with economic theory that the state has to deal in the existing emergency."[8] While an emergency may not become the source of power, nor furnish an excuse for suspending the Constitution, it "may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised."[9] Such a power is the police power, "a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."[10] When conditions change, the law must adjust itself. "Novelty is no argument against constitutionality."[11] Although the regulation of prices, outside certain fields, is unusual, "the power of regulation exists . . . and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the pub-

[7] 230 N. Y. 429, 130 N. E. 601 (1921). The same law was upheld by the U. S. Sup. Ct. in a five to four decision. Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921). People *ex rel.* Durham R. Co. v. La Fetra was cited with approval.

[8] *Id.* at 444, 130 N. E. at 606.

[9] *Id.* at 445, 130 N. E. at 606.

[10] *Id.* at 443, 130 N. E. at 605.

[11] *Id.* at 446, 130 N. E. at 607.

lic to justify public action."[12] This was broad doctrine in 1921. "The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law."[13]

In *People v. Beakes Dairy Co.*[14] and *People v. Perretta*,[15] Pound upheld statutes which provided that no one could carry on the business of buying milk from producers for resale without obtaining a license, and that no one could obtain a license without posting a bond or satisfying the state commissioner of his ability to meet the elaims of the producers from whom he bought. Irresponsible distributors, as the legislature knew, had so frequently failed to pay producers for their milk that there was danger of a refusal on the part of farmers to produce milk for shipment. The statute therefore was not solely for the farmer's benefit; "If it gives him 'a club to aid in the collection of debts which is not given to other creditors' . . . it gives it to him to keep open the stream of milk flowing from farm to city as well as to guard him from financial loss."[16] "The validity of police regulations must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection."[17]

In *People v. Nebbia*,[18] Pound stressed the emergency conditions which produced the statute fixing minimum prices for milk, and accorded the utmost respect to the legislative determination of conditions. He cited the finding of the Pitcher Committee that "the economic law of supply and demand cannot be relied upon either to insure the consumers of a continuous and adequate supply of pure and wholesome milk, or to prevent grave injury to this important industry and its possible disintegration." He then held that in the light of these findings the regulations imposed by the statute were reasonable. "We are accustomed to rate regulation in cases of public utilities and other analogous cases and to the extension of such regulative power into similar fields."[19] Holdings apparently *contra* "are to be read in the light of surrounding circumstances . . . Sentences in judicial opinions are misleading if taken out of their context and read as if they were the gist of the decision".[20] "Doubtless the statute before us would be

[12] *Id.* at 445, 130 N. E. at 607.
[13] *Id.* at 450, 130 N. E. at 608.
[14] 222 N. Y. 416, 119 N. E. 115 (1918).
[15] 253 N. Y. 305, 171 N. E. 72 (1930).
[16] *Id.* at 311, 171 N. E. at 74.
[17] *Id.* at 309, 171 N. E. at 73.
[18] 262 N. Y. 259, 186 N. E. 694 (1933).
[19] *Id.* at 268, 186 N. E. at 698.
[20] *Id.* at 270, 186 N. E. at 698, 699.

condemned by an earlier generation as a temerarious interference with the rights of property and contract; . . . with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view."[21]

While Pound, bound by the decisions of the United States Supreme Court, emphasized the emergency aspect of the legislation, the majority of the Supreme Court, in affirming his decision,[22] took the bold step of sweeping aside the limitations which that court had previously imposed on the power of the states to regulate prices, by which the power had been confined to businesses "affected with a public interest," and concluded that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[23]

Interpretation of Statutes. Many of the decisions, discussed under the present head, in which Pound showed his tendency to give substantial meaning to statutes, might equally well be presented under the head of decisions favorable to the interests of workingmen or other relatively unprivileged groups.[24] Conversely, most of the decisions involving the interests of married women, which are presented[24a] with the unprivileged-group cases, involve also a broad interpretation of statutes.

Sympathizing from the outset with the philosophy of workmen's compensation, Pound took the position that the law "should be construed fairly, indeed liberally, in favor of the employee."[25] He allowed compensation in one case where the accident arose out of another employee's horseplay on the job.[26] But ready as he was to extend the statute as far as its language permitted, he was careful to extend it no further. If an employee steps into a refrigerating plant and contracts a cold which lowers his powers of resistance so that

[21] *Id.* at 270, 186 N. E. at 699.
[22] Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934).
[23] *Id.* at 536, 537, 54 Sup. Ct. at 516.
[24] See p. 37, *infra.*
[24a] See p. 34, *infra.*
[25] Matter of Heitz v. Ruppert, 218 N. Y. 148, 154, 112 N. E. 750, 752 (1916).
[26] *Ibid.*

more serious diseases develop, he has no right to compensation because there has been no "accident" within the meaning of the act, no catastrophic or extraordinary event.[27] In *Matter of Sweeting v. American Knife Co.*,[28] claimant's face was disfigured by the explosion of an emery wheel. The court held such injuries compensable, partly on the ground that insurance against pain of mind and body is as legitimate as insurance against loss of earnings. Pound, concurring specially, did not think that the Act went so far. While the Constitution would permit compensation for all industrial accidents, the Act does not so provide, but is based on the theory that the community should carry the burden of impaired carning capacity. But Pound agreed with Cardozo that in this case the injuries caused impaired ability to get work, and so were compensable. In another case Pound held that the theory of the Act, to make good impaired earning capacity, bars consecutive and concurrent awards for separate injuries incurred in the same accident.[29] Again, a corporate officer who receives a salary of $70 a week and collects $30,000 a year in dividends is not an "employee" within the meaning of the Act, even though he is injured while performing manual labor.[30] In *Shanahan v. Monarch Engineering Co.*,[31] full effect was given to that section of the Act which abrogates common-law remedies.

The Act provides that the Compensation Commission "shall not be bound by common law or statutory rules of evidence."[32] In *Matter of Carroll v. Knickerbocker Ice Co.*,[33] the majority of the court held that hearsay is not sufficient to support a finding; that there must be a modicum of "legal evidence".[34] Seabury and Pound dissented, the latter pointing out that rules of evidence evolved under the jury system might well be "modified and liberalized in their application, when the hearing is before tribunals which adjudicate both on law and fact."[35] If the evidence is admissible, its probative force is for the commission. "It is not to be anticipated that the commission will become confused, waste time, lose sight of the main issue and base awards or refuse them on haphazard hearsay, as our convention is that a jury might if it were permitted to hear everything relevant."[36]

[27]Matter of Lerner v. Rump Bros., 241 N. Y. 153, 149 N. E. 334 (1925).
[28]226 N. Y. 199, 123 N. E. 82 (1919).
[29]Matter of Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379 (1917).
[30]Matter of Bowne v. Bowne Co., 221 N. Y. 28, 116 N. E. 364 (1917).
[31]219 N. Y. 469, 114 N. E. 795 (1916).
[32]WORKMEN'S COMPENSATION ACT, § 68 (Now § 118).
[33]218 N. Y. 435, 113 N. E. 507 (1916).
[34]*Id.* at 440, 113 N. E. at 509.
[35]*Id.* at 447, 113 N. E. at 511.
[36]*Id.* at 450, 113 N. E. at 512.

In *Encarnacion v. Jamison,*[37] the plaintiff, a stevedore, brought an action against his employer for an assault committed by a foreman who was endeavoring to hurry the work of loading a barge. The Appellate Division invoked the fellow-servant rule and denied recovery.[38] In an opinion by Pound, the Court of Appeals reversed. In 1920 Congress had passed the Jones Act, giving to "seamen" the same rights and remedies granted railway employees in the Federal Employers' Liability Act of 1908. The 1908 Act, in abrogating the fellow-servant rule, referred specifically only to actions for negligence and did not mention wilful misconduct. Pound not only followed a decision of Holmes that "seamen" might include stevedores,[39] but proceeded to hold that negligence might include wilful misconduct. It seems a clear instance of taking a statute to mean what the legislature would have said if it had thought of it, rather than what it actually said. This decision has been criticized as misinterpreting the doctrines of maritime law.[40] But the United States Supreme Court accepted Pound's broad interpretation and affirmed his decision.[41]

People ex rel. Wedgewood Realty Co., Inc. v. Lynch,[42] involved the question whether a tax on "dividends" was applicable to a transaction whereby the stockholders of a corporation, which had a large surplus, transferred their stock to a new corporation in exchange for stock *and bonds* of the new corporation. Pound and four other judges held that the bond issue, to the extent of the old surplus, was "a dividend in fact although not in form." It represented a distribution of earnings, although the new corporation which issued the bonds had earned nothing; it was a scheme to evade the tax on dividends, and "The courts should not be deluded by bookkeeping devices." Literally, Judge Lehman was right when he said, in dissenting, that "no dividends were declared." Pound and the majority refused to be bound, in a tax case, by a concept of "dividend" derived from banking or corporation law. They expanded the statute to include a related subject matter which the legislature might reasonably have included.

In *City of Rochester v. Rochester Gas & Electric Corp.,*[43] Pound

[37]251 N. Y. 218, 167 N. E. 422 (1929).

[38]224 App. Div. 260, 230 N. Y. Supp. 16 (2nd Dept. 1928).

[39]International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 Sup. Ct. 19 (1926).

[40]Note (1929) 4 TULANE L. REV. 120. The note points out that a seaman originally had a cause of action only for injuries arising out of the unseaworthiness of the vessel, and it was for this reason alone, and not because of the fellow-servant rule, that he was denied recovery for an assault by an officer. See also note (1930) 5 TULANE L. REV. 120.

[41]Jamison v. Encarnacion, 281 U. S. 635, 50 Sup. Ct. 440 (1930).

[42]262 N. Y. 202, 205, 208, 186 N. E. 673, 674 (1933).

[43]233 N. Y. 39, 134 N. E. 828 (1922).

was the only member of the court who considered that a statutory prohibition against the collection of rent for meters was applicable to a gas company's "service charge" of forty cents per month. Other examples of broad statutory interpretation are *Richardson Press v. Albright,*[44] which involved the requirement of the Statute of Frauds that a promise to pay another's debt be in writing; *People v. Federated Radio Corp.,*[45] which involved the meaning of "fraud" in the Blue Sky Law; and *Kelso & Co. v. Ellis,*[46] in which the court at last recognized the force of the provision of the Negotiable Instruments Law which makes an antecedent debt "value", and consequently overruled the old case of *Coddington v. Bay.*[47] Pound said: "The New York rule was so well established that the inertia of *Coddington v. Bay* carried it along for some distance before the external force of the Negotiable Instruments Law acted upon it . . . Even in this court a dictum in *Bank of America v. Waydell*[48] reveals the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful in New York and many other states."[49]

Repression of Opinion. When proponents of radical change are confronted with a statute which, if upheld and broadly interpreted, denies them the opportunity to express themselves, a dilemma is presented to a liberal judge. His tendency to interpret broadly, and to uphold, changes which the legislature has made in our legal situation, is opposed by his tendency to protect unprivileged persons and the free advocacy of further change. With Pound the latter sort of tendency seems to have predominated. In *People ex rel. Doyle v. Atwell*[50] defendants had violated a municipal ordinance which forbade street meetings without a permit from the mayor. They had first applied for a permit, which had been refused expressly because they were Socialists. Held for trial in a magistrate's court, their petition for *habeas corpus* was denied. The Court of Appeals affirmed this denial, holding the municipal ordinance constitutional and ruling that if the mayor had abused his discretion the defendants should have sought redress in the courts instead of holding their meeting in defiance of the law. Even Judge Cardozo concurred in the result. Pound alone dissented.

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[44]224 N. Y. 497. *Cf.* (1917) 2 CORNELL L. Q. 209, (1919) 4 *Id.* 60.
[45]244 N. Y. 33, 154 N. E. 655 (1926).
[46]224 N. Y. 528, 121 N. E. 364 (1918).
[47]20 Johns. 636 (N. Y. 1822).
[48]187 N. Y. 115, 120, 79 N. E. 857 (1907).
[49]Kelso v. Ellis, *supra* note 46, at 536, 537.
[50]232 N. Y. 96, 133 N. E. 364 (1921).

He held the ordinance unconstitutional, relying on *Yick Wo v. Hopkins*,[51] where the United States Supreme Court had held that the constitutionality of a statute might be determined by the manner in which it is enforced: if its administration is directed against a certain group, the statute, though valid on its face, becomes void. "The *Yick Wo* case was one of discrimination against the Chinese; the case before us is one of discrimination against the Socialists. The California ordinance may have been conceived in iniquity, while the Mt. Vernon ordinance was enacted before it became customary to adopt repressive measures against the Socialists, but if the unconstitutional purpose is the test no distinction is made between the enactment and the enforcement . . . The people are not to be lawfully deprived of their free customs and privileges by the mere will of the magistrate . . . The presumption is that discretionary power will not be arbitrarily exercised but when it is so exercised the Supreme Court of the United States has not hesitated to hold that it will protect the individuals thus oppressed."[52]

In *People v. Gitlow*[53] defendants were imprisoned for advocating "Left Wing" socialism, under a statute which made it a crime to advocate anarchy and defined anarchy as the doctrine that organized government should be overthrown by violence. The defendants advocated revolution by direct rather than constitutional means, and the "dictatorship of the proletariat" brought about by the mass strike. The Court of Appeals affirmed the conviction. Pound dissented, and with him Cardozo concurred. The statute, Pound pointed out, was passed after the assassination of McKinley and was aimed at anarchism, which was then widely advocated in Europe. Anarchism means the absence of any supreme power in the state. As such it is the antithesis of an organized proletarian dictatorship, and a statute aimed at the one should not be applied to the other. Pound had no liking for Left Wing socialism; he called it a "pretentious and vicious program glibly advocated." An actual attempt to set up such a government, he conceded, would be unlawful, but he found "nothing in our statute which makes it a crime to teach such revolutionary doctrines and advocate such a change in our form of government".[54] The decision of the majority of the Court of Appeals in *People v. Gitlow* was affirmed by the United States Supreme Court. Justices Holmes and Brandeis dissented; not on the ground taken by Pound and Car-

[51] 118 U. S. 356, 6 Sup. Ct. 1064 (1886).

[52] 232 N. Y. 96, 105, 107, 133 N. E. 364, 367, 368 (1921).

[53] 234 N. Y. 132, 136 N. E. 317 (1922); *aff'd.* 268 U. S. 652, 45 Sup. Ct. 625 (1925).

[54] 234 N. Y. 132, 157, 158, 136 N. E. 317, 327 (1922).

dozo, but on the ground that the statute as applied to the acts of the defendant was in conflict with the due process clause of the Fourteenth Amendment, since "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[55]

III. Judge Pound and the Unprivileged

Since radical propagandists are unpopular and unprivileged persons, Pound's opinions adverse to their repression, which have just been discussed as examples of his tolerance toward change, also illustrate his care for the unprivileged. Other unprivileged groups for whose interests he showed concern may be roughly differentiated under the heads of married women, workingmen, foreigners, the unconventional, criminals, and the "public".

Married Women. In cases involving the interests of married women, Pound tended strongly to interpret the law so as to allow them the fullest independence and equality with men. His first opinion in the Court of Appeals, in *Matter of Goodrich v. Village of Otego,*[56] dealt with rights under the Married Women's Property Acts. In this case a husband and wife were tenants by the entirety. The husband sued for injury to the land by a change in street grade, and recovered below as owner in fee. Reversing, Pound pointed out that the effect of the Married Women's Property Acts was to make tenants by the entirety tenants in common with equal rights. A husband who sued alone could recover only for the diminution in value of his own estate.

When it came to allowing a married woman a right of action against her husband for a personal tort, the rest of the Court of Appeals was not willing to go along with Pound. In *Allen v. Allen,*[57] an action for malicious prosecution, the court, including Chief Judge Cardozo, without opinion, denied the wife a remedy on the authority of *Schultz v. Schultz,*[58] decided in 1882. Pound and Andrews alone dissented. In an exhaustive opinion, Pound pointed out that the *Schultz* case had been decided before the passage of section 57 of the Domestic Relations Law, which expressly allows a married woman a right of action "for an injury to her person, property or character . . . as if unmarried." This he thought, in conjunction with the Married Women's Property Acts, showed an intent to do away with all restrictions

[55]Gitlow v. New York, 268 U. S. 652, 673, 45 Sup. Ct. 625, 632 (1925).
[56]216 N. Y. 112, 110 N. E. 162 (1915).
[57]246 N. Y. 571, 159 N. E. 656 (1927).
[58]89 N. Y. 644 (1882).

on married women's rights. "When the wife is given in law, as in fact, an existence separate from her husband for all other purposes, the courts should not, by speculating on the legislative intent, remerge her being into that of her husband and assume a legal unity of husband and wife to exist for the single purpose of protecting him when he injures her person without right."[59] "Immunity is barbarous."[60]

Another case involving the position of women under modern statutes is *Matter of Thorne*.[61] A husband had obtained a decree of divorce, and had been awarded custody of a child on the ground that the mother was unfit to be entrusted with it. The husband then died, in Duchess County, and the surrogate of that county appointed guardians for the infant without citing the mother, who was domiciled in New York County. The mother moved to have this appointment vacated. In a four to three decision in which Judge Cardozo concurred, Pound affirmed an order granting the mother's motion. He took the position that while in former times only the father's domicile mattered, because the headship of the family was in him alone, in modern times when the father dies the child takes its mother's domicile. The divorce decree merely decided custody as between husband and wife, and had no effect after the husband's death. The surrogate might in his discretion appoint some one else as guardian, but that fact did not prevent the child's domicile from being that of its mother, or confer jurisdiction upon the courts of the county where the child's father died. "The dilemma, it would seem, is this: Shall she be ignored as an outcast or recognized as a mother?"[62]

Burritt v. Burritt,[63] a case which Pound decided as a trial judge as early as 1907, was a divorce action brought by a wife. The referee had found in favor of the plaintiff, but had awarded the three children of the parties to the adulterous defendant because of minor unconventionalities on the plaintiff's part. Pound agreed with the referee as to divorce but disagreed with him as to custody. This created a dilemma, for the court had, as Pound observed, "power only to confirm or to refuse to confirm the referee's report". He proceeded to do neither. His opinion concludes: "The report is confirmed and judgment ordered in accordance therewith, but with leave to the plaintiff to apply . . . for a modification of the judgment herein as far as relates to the custody of said children and allowance for their support. Meanwhile, let the execution of judgment be stayed, so far as it

[59] 246 N. Y. 571, 581, 159 N. E. 656, 660 (1927).
[60] *Id.* at 584, 159 N. E. at 661.
[61] 240 N. Y. 444, 148 N. E. 630 (1925).
[62] *Id.* at 449, 148 N. E. at 631.
[63] 53 Misc. 24, 25, 102 N. Y. Supp. 475 (Sup. Ct. 1907).

awards custody of the children to the defendant." It required the ingenuity and courage of a "strong" judge, as well as a regard for the interests of the mother and her children, thus to "keep the word of promise to the ear and break it to the hope."

Judge Pound not only insisted on independence for married women, but tended to accord them a special degree of protection, when they seemed to stand in need of it, against unkind or unfair treatment. In *Hofmann v. Hofmann,*[64] the plaintiff's husband had secured an invalid divorce in a foreign jurisdiction and had thereupon purported to remarry, and had informed various people, including the plaintiff's children, of the pretended divorce and re-marriage. Pound held this sufficient to support a charge of cruelty in an action for separation. While adultery is not ordinarily cruelty, he said, it may be if it is "open and notorious, flaunted in the eyes of the public or dragged into the presence of the blameless wife or husband."[65] In spite of this express inclusion of both spouses, it may be questioned whether, if the shoe had been on the other foot, a wife's invalid divorce and remarriage would have been considered "cruelty" to a husband. In *Farnham v. Farnham,*[66] disappointed relatives sought to annul defendant's marriage with her deceased husband so that they might obtain her share of the property. The majority of the court, including Judge Cardozo, refused defendant an allowance for alimony *pendente lite* and for counsel fees, because she was not being sued by her husband. Pound and Chase, JJ. dissented. Pound conceded that the defendant had no right to alimony, because the plaintiffs owed her no duty of support, but he thought that counsel fees should be allowed. "On general principles of equity, the court should have power to require those who seek to annul a marriage for their pecuniary gain to pay such sums as may be necessary to enable the wife to conduct her defense."[67] It was not suggested that a husband would have been entitled, in a like case, to the same protection. In *Scheinberg v. Scheinberg,*[68] after a wife had obtained a separation from her husband, he caused three distinct suits to be brought against her, one to impress a trust in his favor upon certain land, one to foreclose a mortgage which he had formerly persuaded her to take out for his convenience, and one to throw her into bankruptcy. While she was in danger of losing her property in any one of these proceedings, and without funds to support herself or to pay lawyers, she agreed that if he would stop

[64] 232 N. Y. 215, 133 N. E. 450 (1921).
[65] *Id.* at 218, 133 N. E. at 451.
[66] 227 N. Y. 155, 124 N. E. 894 (1919).
[67] *Id.* at 161, 124 N. E. at 895.
[68] 249 N. Y. 277, 164 N. E. 98 (1928).

the proceedings against her she would sell him the property at a price which was less than half its value. He obtained a decree for specific performance of this agreement in the lower courts, but Pound, observing that "the taint of coercion and fraud infects the whole transaction,"[69] reversed. "Courts of equity refuse to enforce harsh and unfair bargains . . . If one party acts unfairly and the other yields to the pressure of circumstances, equity will refuse specific performance even though in law the contract would be enforced."[70]

Workingmen. Pound wrote various opinions favorable to the interests of workingmen where those interests conflicted, or appeared to conflict, with the interests of employers. His leadership in sustaining the validity of the workmen's compensation acts, and his tendency to interpret those acts and similar acts liberally, have been discussed.[71] In *Stillwell Theatre, Inc. v. Kaplan,*[72] the defendants peacefully picketed the plaintiff's theatres with a sign bearing the true statement, "Owners of this theatre refuse to employ members of Motion Picture Operators Union Local 306, affiliated with the Ameriean Federation of Labor."[73] The plaintiff corporation had contracted with a rival union to employ its members. The lower courts, which had ordered the defendants to cease displaying these signs, were reversed in an opinion from which only one judge dissented. For the court, Pound said: "To state fairly and truly to the public that the conduct of the employer is socially objectionable to a labor union is no persuasion to break a contract."[74] "The interests of capital and labor are at times inimical and the courts may not decide controversies between the parties so long as neither resorts to violence, deceit or misrepresentation to bring about desired results."[75] The decision is important, as it obviates the possibility of an employer's using a contract with a company union as a basis for restraining the activities of a real union.[76].

In cases involving negligence, Pound frequently expressed dissatisfaction with the readiness of trial courts to find injured workmen[77] guilty of contributory negligence as a matter of law. He held that an employee who fell through an open hatch in the dimly lighted hold of a ship was not as a matter of law contributorily negligent in failing

[69] *Id.* at 283, 164 N. E. at 99.
[70] *Id.* at 281, 282, 164 N. E. at 99.
[71] *Supra*, p. 22, 29.
[72] 259 N. Y. 405, 182 N. E. 63 (1932).
[73] *Id.* at 408, 182 N. E. at 64.
[74] *Id.* at 412, 182 N. E. at 66.
[75] *Id.* at 410, 182 N. E. at 65.
[76] (1932) 46 HARV. L. REV. 131.
[77] Or highway travelers; see p. 42, *infra*.

to have adequate light, when the place was unfamiliar to him and he had received no warning of its danger;[78] nor was a linesman necessarily negligent when he touched with his bare hand a telephone wire which he was repairing and received a fatal shock because it had come into contact with fallen electric light wires.[79] "Ordinary prudence remains the test of reasonable eare and all the burden cannot be placed upon the employee by general rules requiring him to look out for himself, when . . . nothing was done by the employer to enforce compliance with the rule which required rubber gloves to be used . . . and there is evidence tending to show that the rule was not understood to apply to such work . . . "[80] In each of these cases Pound spoke for the majority of a divided court which reversed the Appellate Division.

Foreigners and Foreign Governments. Foreign individuals and governments were apt to find Pound on their side. In *Matter of Lendle,*[81] the Appellate Division had held that a legacy expressed in marks, and payable to the German relatives of the American testator, should be computed at the rate of exchange which prevailed on the day of the execution of the will, when the mark was paper and was worth $.0153. Pound and the Court of Appeals held that it was payable "in marks which pass as such in the market at the time the legacies are paid". Although the testator could hardly have foreseen it, the gold mark had by that time been restored, and the reversal gave the German relatives $112,000 instead of $7,000. In *Johnston v. Compagnie Générale Transatlantique,*[82] Pound held that the judgment of a French court, unless impeached for fraud, was conclusive between the parties, notwithstanding the facts that a French court in a converse case would examine the merits and that the United States Supreme Court had retaliated, in the name of comity, by holding that a French judgment was no more than *prima facie* evidence of the validity of a elaim.

Pound wrote one dissenting opinion and one opinion of the court in cases which involved acts of the Soviet government and were decided before the American recognition of the Soviets. In *First Russian Insurance Co. v. Beha, Supt. of Insurance,*[83] the question was whether funds deposited by a Russian insurance corporation with the New York State Superintendent of Insurance could be recovered in the name of the corporation after all its assets had been sequestrated by a Soviet decree. In a *per curiam* opinion in which Judge Cardozo

[78]Seyford v. Southern Pacific Co., 216 N. Y. 613, 111 N. E. 248 (1916).
[79]Larkin v. New York Telephone Co., 220 N. Y. 27, 114 N. E. 1043 (1917).
[80]*Id.* at 32, 114 N. E. at 1045.
[81]250 N. Y. 502, 506, 507, 166 N. E. 182 (1929).
[82]242 N. Y. 381, 152 N. E. 121 (1926).
[83]240 N. Y. 601, 148 N. E. 722 (1925).

concurred, the Court of Appeals allowed recovery. Pound alone dissented.[84] He pointed out that the Insurance Law provides that when a foreign corporation having assets in this state has "had its property sequestrated in its domiciliary state or country", the superintendent of insurance may apply for an order permitting him to conserve its assets for the benefit of its creditors. "Without recognizing the Soviet decrees, we must recognize the resulting facts. It is as if the Soviet government had decreed the death of *A* and *A* had been executed. If he had been a citizen of New York we might say that he was murdered, but none the less we would proceed to administer his estate. We would deal with the fact and ignore the cause."[85] "We should not lose sight of future consequences nor should the Russian companies, in their equivocal position of being corporations to enforce their claims and *nul tiel* corporations when sued, be dealt with too indulgently in our courts."[86] In *Salimoff & Co. v. Standard Oil Co.*,[87] the Court of Appeals unanimously recognized the effectiveness of the Soviet confiscation of Russian oil lands formerly owned by the Salimoffs, and the sale of oil from the lands to the Standard Oil Company, by holding that the plaintiffs could not compel the defendant to account. This time Pound wrote the court's opinion. He observed that the United States government had recognized the existence of the Soviet government "as a fact although it has refused diplomatic recognition as one might refuse to recognize an objectionable relative although his actual existence could not be denied."[88] Of the court's decision in the *Russian Insurance Company* case and another, Pound said: "We have reached the conclusion in those and similar cases that such decrees had no extraterritorial effect and that the continued existence of such companies, wherever they were found to function outside of Russia, would be recognized. The consequence has been that corporations non-existent in Russia have been, like fugitive ghosts endowed with extraterritorial immortality, recognized as existing outside its boundaries. The juristic person, the Russian corporation, dead in the country which created it, has received juridical vivification elsewhere."[89] Although Pound courteously said that "In this case another situation is presented",[90] it is apparent that his own attitude in the two cases was consistent. He recognized the same fac-

[84]McLaughlin and Andrews, JJ., not sitting.
[85]*Id.* at 602, 603, 148 N. E. at 723.
[86]*Id.* at 604, 148 N. E. at 723.
[87]262 N. Y. 220, 186 N. E. 679 (1933).
[88]*Id.* at 226, 186 N. E. at 682.
[89]*Id.* at 225, 226, 186 N. E. at 681, 682.
[90]*Id.* at 226, 186 N. E. at 682.

tual force in Soviet action when it tended to enrich the New York State Department of Insurance as when it enriched the Standard Oil Company.

The Unconventional. In *Matter of Schwarz v. Association of the Bar,*[91] the court held it proper to disbar an attorney who sent circular letters to former clients soliciting further patronage of his collection agency. The attorney's conduct in so doing contravened a rule of propriety which lawyers as a group have found it pleasant and profitable, and perhaps useful to the public, to set up; and it happens that lawyers call their rules of propriety "ethics", regardless of the presence or absence of ethical content. Pound vigorously dissented. In an opinion in which Judge Hiscock and Judge Cardozo joined, he argued that "Disbarment not only deprives the attorney of his livelihood, but casts him out a pariah in the community", and that the rules included in professional Codes of Ethics "which do not involve the distinction between natural right and wrong should not be too strictly applied against one whose sin has been against good taste rather than good morals." In a later case involving unconventional conduct of another sort, which was decided after Judge Hiscock's retirement, the court again divided four to three, but this time Pound and Cardozo were joined by Lehman and Kellogg, and Pound spoke for the court. The defendants in *People v. Wendling,*[92] who had dramatized what Pound referred to as "the ancient folk song, 'Frankie and Johnnie' ", were convicted of presenting an indecent play "which would tend to the corruption of the morals of youth or others." The Court of Appeals reversed the conviction. Pound conceded that the play was " 'indecent' from every consideration of propriety"; but a conviction, he pointed out, was not justified unless the play tended to corrupt morals. "The court is not a censor of plays and does not attempt to regulate manners . . . Prostitutes are not so rarely represented on the stage as to arouse the sexual propensities of the spectators whenever they appear . . . The Bible talks bluntly of harlots and whores but it does not incite to immorality."[93] "The fact that Frankie and Johnnie and their companions were not nice people does not in itself make the play obscene."[94] Pound took evident pleasure in his result and his argument. In a footnote he gravely referred the reader to "Dr. Sigmund Spaeth, 'Read 'em and weep—The Songs You Forgot to Remember' ". But his sense of the respect due to legislatures and juries placed him

[91] 231 N. Y. 642, 644, 645, 132 N. E. 921, 922, 923 (1921).
[92] 258 N. Y. 451, 180 N. E. 169 (1932).
[93] *Id.* at 453, 180 N. E. at 169.
[94] *Id.* at 455, 180 N. E. at 170.

among the majority when a divided court sustained a conviction for possessing Schnitzler's "Reigen" on the theory that it was an indecent book.[95]

Criminals. Pound felt strongly on the subject of the "third degree".[95a] In *People v. Barbato,*[96] in reversing a conviction because an extorted confession was admitted in evidence, he said: "Lawless methods of law enforcement should not be countenanced by our courts even though they may seem expedient to the authorities in order to apprehend the guilty. Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime. If torture is to be accepted as a means of securing confessions, let us have no pretense about it but repcal section 395 of the Code of Criminal Procedure . . . "[97] But Pound was not inclined to reverse unless there was room to believe that the extorted confession might have influenced the conviction. In *People v. Trybus*[98] there was adequate evidence, including eyewitness testimony and unimpeached confessions, of the defendant's guilt of first degree murder. The earliest confessions had been obtained while the defendant was under illegal restraint, and was being abused by private detectives. Pound wrote the opinion of the court which sustained the conviction. "The conduct of a detective in needlessly laying hands on a helpless man detained by him without legal warrant deserves the severest censure. The practice of detectives to take in custody and hold in durance persons merely suspected of crime in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction."[99] But "defendant himself does not claim that *all* his statements were involuntary or inspired by hope or fear. In fact, he wholly fails to testify that he made any of the statements *because* he was in fear or *because* he was promised partial immunity."[1]

A case involving the interests of ex-convicts is *Derrick v. Wallace.*[2] The plaintiff in a civil action admitted, on cross-examination, his conviction many years before of the crime of forgery. Pound, again speaking for the court, held that he should then have been permitted to introduce evidence of his general good reputation in his community. "Is he to be discredited for life rather than permitted to call witnesses to his present good character?"[3]

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[95]People v. Pesky, 254 N. Y. 373, 173 N. E. 227 (1930).
[95a]*Cf.* Pound's article, *Inquisitorial Confessions* (1915) 1 CORNELL L. Q. 77.
[96]254 N. Y. 170, 172 N. E. 458 (1930).
[97]*Id.* at 178, 172 N. E. at 461.
[98]219 N. Y. 18, 113 N. E. 538 (1916).
[99]*Id.* at 22, 113 N. E. at 539, 540.
[1]*Id.* at 23, 113 N. E. at 540.
[2]217 N. Y. 520, 112 N. E. 440 (1916).
[3]*Id.* at 524, 112 N. E. at 441.

The "Public". Many controversies no party to which is obviously a member of an unprivileged group nevertheless involve a fairly clear conflict between the interests of the more fortunate minority and of the less fortunate majority. Here again Pound was usually on the side of the unprivileged. His limited sympathy with "business" interests has been noted.[4] His tendency to uphold the constitutionality of statutes taxing corporate income,[5] and to interpret such statutes broadly,[6] was at the same time a tendency toward letting the burdens of taxation fall upon the prosperous. In sustaining emergency legislation of various types,[7] he protected the interests of tenants of residence property as against landlords, and of farmers and consumers of milk as against middlemen.

In cases arising out of highway accidents, as in the cases involving work accidents,[8] Pound was relatively reluctant to discover contributory negligence. When a majority of the court held a foot-passenger contributorily negligent as a matter of law for crossing a Bronx street, as Pound expressed it, "without waiting for the procession to pass by," and thirty feet in front of a moving street car, Pound wrote a dissenting opinion to the effect that "this standard of dangerous nearness may do for the leisurely life of rural communities, but" not "in the rush of city life."[9] In a case where a traveler had looked in both directions and had then driven his horse and buggy upon railroad tracks where he was struck by a train which approached without warning, the whole court agreed with Pound that it was error to hold the traveler contributorily negligent as a matter of law on the ground that by greater care he might have avoided the accident.[10] "It is not the law," he said, "that as a distinct and conclusive circumstance, one must assume that no warning of the approach of trains will be given and relax in no degree his vigilance although silence suggests security, and it is not the law that one who has once looked from a proper viewpoint must, at his peril, look again before proceeding."[11]

Repeatedly Pound's voice and vote supported the interests, actual

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[4]See p. 20, *supra*.

[5]People *ex rel.* Alpha Portland Cement Co. v. Knapp, *supra* p. 24.

[6]People *ex rel.* Wedgewood Realty Co., Inc., v. Lynch, *supra* p. 31.

[7]See p. 27, *supra*. [8]See p. 37, *supra*.

[9]McGuire v. New York Railways Co., 230 N. Y. 23, 29, 128 N. E. 905, 907 (1920).

[10]Carr v. Pennsylvania R. R. Co., 225 N. Y. 44, 121 N. E. 473 (1918).

[11]*Id.* at 47, 121 N. E. at 474.

Pound repudiated the familiar sentiment that to give a negligence case to a jury is to favor an impecunious plaintiff over a corporation defendant. "The tradition that juries invariably find against a corporation defendant if given the opportunity to decide the question of fact is obsolescent if not obsolete."

or apparent, of consumers and the general public in conflicts with public utilities and concerns which claimed that character. In *Matter of Quinby v. Public Service Commission,*[12] he spoke for the majority of the court in holding, contrary to the usual opinion, that a general delegation to a state commission of power to regulate rates did not carry with it the power to raise street-car fares which had been agreed upon between the utility and a municipality.[13] In *Matter of International Railway Co. v. Rann,*[14] again speaking for a court which was not unanimous, he held that a provision in a city charter requiring a referendum on any resolution of the council "disposing of any property or rights of the city" was applicable to a resolution by which the city council undertook to consent to an increase in street-car fares beyond the contract rate of five cents; although the principal benefit of the existing contract obviously accrued not to "the city" but to its inhabitants. In *Holmes Electric Protective Co. v. Williams,*[15] Pound and Cardozo dissented from a decision which recognized as a "telegraph company", entitled to occupy the streets of New York with its wires, a concern which performed no services for the general public and transmitted no messages, but merely supplied a burglar-alarm system and watchmen to its subscribers by private contract. In *City of Rochester v. Rochester Gas & Electric Corporation,*[16] Pound alone dissented from a decision which upheld a "service charge", to consumers of gas, of forty cents per month. He held that the charge was objectionable both as an indirect violation of a statute which prohibited the collection of rent for meters, and as a discrimination; "A uniform compensation for service is provided when the service to consumers is unequal".

In upholding the power to spend public money for a soldiers' bonus,[17] and for the compensation of an individual accidentally wounded by a public officer,[18] Pound protected the interests of the average man as against the state or the municipality. The same is true

[12]223 N. Y. 244, 119 N. E. 433 (1918).

[13]Some of the subsequent vicissitudes of this doctrine are reviewed in Village of Mamaroneck v. Public Service Commission, 208 App. Div. 330, 203 N. Y. Supp. 678 (3rd Dept. 1924), *aff'd.* 238 N. Y. 588, 144 N. E. 503 (1924), and in Matter of United Traction Co. v. Public Service Commission, 219 App. Div. 95, 219 N. Y. Supp. 421 (3rd Dept. 1927).

[14]224 N. Y. 83, 85, 120 N. E. 153 (1918).

[15]228 N. Y. 407, 127 N. E. 315 (1920).

[16]233 N. Y. 39, 54, 134 N. E. 828, 834 (1922).

[17]People v. Westchester County National Bank, 231 N. Y. 465, 132 N. E. 241 (1921), *supra* p. 26.

[18]Matter of Evans v. Berry, 262 N. Y. 61, 186 N. E. 203 (1933), *supra* p. 26.

of the cases in which he took a broad view of the right of recovery against a municipal corporation for negligent injury.[19]

IV. The Greatness of Judge Pound

Dean Roscoe Pound has recently told us that four characteristics have caused Justice Cardozo and nine earlier Ameriean judges to be "rated in the first rank."[20] The Dean's "list of our greatest judges" does not include his kinsman, Judge Pound. I can not undertake comparison between Judge Pound and John Bannister Gibson, Thomas Ruffin, or Charles Doe, each of whom is on Dean Pound's list. But no one can read Judge Pound's opinions without knowing that he was a great judge. Dean Pound finds that the "first ten" American judges had four characteristics in common: (1) mastery of the lawyer's craft, (2) coincidence in time with a formative legal era, (3) sound judicial technic and sound judgment and discretion in expounding, interpreting and applying the law, and (4) legal scholarship. Judge Pound was a great judge by these criteria, and also by criteria to which Dean Pound does not advert.

He had, in the first place, a varied knowledge and understanding of life, an extraordinary versatility in grasping the background and meaning of the diverse problems, whether domestic, commercial, or social, which came before his court.[21] In the second place, as appellate judges do their work with words, their accomplishment depends in large degree upon the effectiveness with which they use words. Judge Pound's judicial style is seldom equaled. It is neither severe nor ornate. In terms of the old text-book trilogy of "clearness, force and beauty", the important qualities for judicial writing are clearness and force, that the reader may see what is meant and, if possible, be brought to assent to it. It is for clearness and force that Judge Pound's style is conspicuous. No "purple patches" divert attention from the matter in hand to the merits or demerits of the author's manner. Such beauty as there is is not introduced for its own sake; it is incidental to conciseness and vigor. The most ornamental feature of his style is a certain pungency. "The preceding fifty-four pages of the opinion may be regarded as magnificent dictum, entitled to the utmost respect, but not determinative of the question."[22] "An historical justification of

[19]See p. 18, *supra*.

[20]Pollard, Mr. Justice Cardozo, A Liberal Mind in Action (1935); foreword by Roscoe Pound.

[21]Perhaps something of this quality is implicit in the "judgment" and "discretion" of Dean Pound's third criterion.

[22]Johnston v. Compagnie Generale Transatlantique, 242 N. Y. 381, 388, 152 N. E. 121, 123 (1926).

liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency."[23] "Aquiescence will not be inferred from the silence of the dead."[24] "Secret societies have, in the past, been recognized as meeting a desire of many of our citizens to band themselves together by oaths more horrific than harmful."[25] "If the litigants lose, the law is enriched by another precedent."[26]

Finally, a judge's performance depends not only upon his skill in reaching and expressing desired (or other) results, but also upon the character of the results which he desires. As judging is not a purely intellectual process, as a judge's emotions and point of view give direction to his work, they should not be forgotten when his work is evaluated. Judge Learned Hand, in discussing Mr. Justice Holmes, bas said that "in the end, and quite fairly, a judge will be estimated in terms of his outlook and his nature."[27] Judge Pound was eminent in his tolerance toward statutes, judicial legislation, and change. He was close to preeminence in his ability to differentiate between the interests of the privileged class to which judges belong and the interests of society, in his prevailing impulse to protect the interests of the unprivileged.

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[23]People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 446, 130 N. E. 601, 607 (1921).

[24]Nankivel v. Omsk All Russian Government, 237 N. Y. 150, 158, 142 N. E. 569, 571 (1923).

[25]People v. Zimmerman, 241 N. Y. 405, 409, 150 N. E. 497, 498 (1926).

[26]Matter of Crouse, 244 N. Y. 400, 403, 155 N. E. 685, 686 (1927).

[27]In MR. JUSTICE HOLMES, ed. by Felix Frankfurter (1931), p. 122, 123.